No. 14,608

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN LEE,

Appellant,

vs.

EDWIN B. SWOPE, Warden, or his Successor, United States Penitentiary, Alcatraz, California,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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Table of Authorities Cited

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Now comes John Lee, appellant in the above-entitled cause by his attorneys, Jack L. Blaine, Charles Upton Shreve and Carl L. Rhoads, and as a reply to brief for appellee doth make the following argument, to-wit:

The respondent has cited the case of *In re Craig,* 70 Fed. 969, as his principal authority to show that the general court-martial which sentenced John Lee would in fact have jurisdiction to try him by court martial notwithstanding the fact that he had been

dishonorably discharged two years prior to the date of the offense for which tried. It is true that the facts of such case are quite similar to the case at bar, but we must take into consideration the fact that such case was decided 60 years ago and that the Uniform Code of Military Justice which now is the legal authority for courts-martial is considerably different than the old code then in effect and that in the present day the more enlightened Congress has apparently seen fit to more carefully safeguard the rights of military and naval personnel than had been done heretofore.

The respondent also cites the case of *Kahn v. Anderson,* 255 U.S. 1 as being a companion case to *In re Craig,* supra, but a careful examination of such case shows that such case is not in point with the case at bar inasmuch as in the *Kahn* case the dishonorable discharge had not been executed prior to the date of the commission of the offense for which the accused was subsequently tried by a second court-martial and which sentence was challenged on the point of jurisdiction by a writ of habeas corpus. It is true that the dictum of the *Kahn v. Anderson* case, supra, and of *Mosher v. Hudspeth,* 123 F.2d 401 and *Mosher v. Hunter,* 143 F.2d 745 (both cases involve the same petitioner, the *Hudspeth* case having been tried on a writ of habeas corpus in 1941 and the *Hunter* case in 1944) also have dictum which refers back to the *Kahn v. Anderson* and *In re Craig* cases, supra, but such Courts did not have to pass on the issue of the case at bar in that they were confronted with the situation

where the accused had in fact been discharged prior to the commission of the offense for which he was subsequently brought to trial by court-martial.

The case of *Carter v. McClaughry,* 183 U.S. 365, 383, which the respondent also cites does not appear to be in point inasmuch as Captain Carter, an Army officer, who was challenging the jurisdiction of the court-martial to try him and wherein the Court ruled against him had never been discharged from the Army and was without question an United States Army Officer on active duty with the Army at the time of the commission of the embezzlement for which he was brought to trial by court-martial. He had in fact been detailed to a river improvement program and in his habeas corpus proceeding he was questioning the jurisdiction of the Court only in so far as he alleged that he was twice put in jeopardy because the sentence of general court-martial was greater than the court-martial had jurisdiction to inflict on any one of the several Courts taken singularly with which he was charged. In other words he was arguing that there was multiplicity of Courts all arising out of the same transaction. The Court rightly ruled against him on this point, but such point is certainly not in issue in the case at bar.

The respondent has also cited the case of *Perlstein v. United States,* 151 F.2d 167 and *Mobley v. Handy,* 176 F.2d 491 as illustrating the type of case wherein the military retains jurisdiction over the civilian. In the *Perlstein* case a soldier was discharged in the country of Eriteria on the 19th of September, 1942,

but took a job as a civilian with one of the contractors who was engaged in salvage operations as part of an Army project. On the 26th of September one week after his discharge and while employed as a civilian by the contractor he committed larceny for which he was subsequently brought to trial by court-martial. He challenged the jurisdiction of the court-martial on a writ of habeas corpus, and the Court rightly ruled that he was a "person accompanying the armies of the United States in the field in time of war".

In the *Mobley* case, supra, the accused was attached to the Army as an employee at a post exchange in Germany and was arrested after the state of war had ceased to exist between the United States and Germany. Before he was brought to trial by court-martial his term of enlistment expired, and he was discharged. He later broke arrest and returned to the United States and was subsequently apprehended by the military police in Texas and returned to Germany where he was forced to stand trial by general court-martial. He also raised the question of jurisdiction of the court-martial to try him at a time after his discharge had in fact been executed. The Court in that case as in the *Perlstein* case, supra, ruled against the petitioner and held the court-martial did in fact have jurisdiction to try him, because he was a "person accompanying the armies of the United States in the field". Such rulings are clearly understandable but were clearly not applicable to the case at bar inasmuch as the petitioner in the case at bar was not outside the United States and so clearly was

not a "person accompanying the armies of the United States in the field". The only section of Article 2 which is applicable to this case is Section 2 E which provides that a person is subject to court-martial when he is in custody serving a sentence imposed by court-martial. If we examine Section 2 E further, it is very apparent that Congress never intended that the Courts carry such provision to such an extreme as to hold that the Army retains jurisdiction over him after he had been effectively discharged.

There are many cases which could be cited, and I do not believe that it will even be argued by the respondent that if a convicted military prisoner is discharged and is subsequently transferred to a civilian penitentiary and while there commits a crime even though it might be a crime against a member of the active military forces he would be brought to trial for such an offense as a civilian and hence would be afforded his rights under the Fifth and Sixth Amendments to the Constitution. Such would unquestionably be the result even though he had only recently been transferred to such prison and even if he had many years yet to serve on the sentence which had been adjudged by court-martial. We submit that if a discharged military prisoner is a civilian under such circumstances so as to be entitled to his vested rights under the Fifth and Sixth Amendments to the Constitution, then by the same token the soldier who is discharged under similar conditions although he might be retained in the custody of military authorities in the United States to serve such sentence, he has never-

theless had a "change of status" from a "person subject to the code" to that of a "civilian" and that such change of status is just as real as if he were transferred to a federal civilian penitentiary to serve the sentence imposed upon him. It is well recognized that a court-martial is a Court of limited jurisdiction, and the Courts should be very careful to limit but not to broaden the scope of jurisdiction of such Court over that which the Congress intended to give it. We submit that after a military prisoner has been discharged from the Army, is not receiving pay or allowances, he cannot be required to fight for his country and cannot be restored to duty, but is nevertheless in custody of the Army at a military installation in the United States, then he is in fact a civilian and for all practical purposes he is the same as any civilian laborer that happens to be employed by the Army at that particular installation in the United States.

It has been clearly demonstrated in the case of *Ex parte Weitz,* D.C.D. Mass. 1919, 256 F. 58, 59 that such a civilian even though working on a military establishment is not subject to trial by court-martial. In 1919 one Weitz was a civilian chauffeur employed by a contractor doing construction work at Camp Devens, Massachusetts during World War I. While transporting the contractor's employees about the camp, the automobile he was driving ran into and killed a soldier. On being held by the military authorities he applied for a writ of habeas corpus. The writ was allowed on the ground that Weitz was not "accompanying or serving with the Armed

Forces", because his work had no "direct relation to the transport, maintenance or supply of any Army in the field". The Court did recognize that if Weitz had been so employed he would have been subject to court-martial jurisdiction.

We submit that the *Weitz* case, supra is in fact much akin to the case at bar and that the petitioner, John Lee, was in fact a civilian in the custody of the Army but not under its legal jurisdiction at the time of the alleged offense for which he was court-martialed and which sentence is being tested by this petition for writ of habeas corpus for the reasons above cited as well as the argument presented in appellant's opening brief and supplemental brief.

We submit that the court-martial which convicted John Lee on September 13, 1949 was fully without jurisdiction to try him and hence that his case should be remanded to the Federal District Court for proper disposition before the Federal District Attorney.

Dated, May 11, 1955.

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